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FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of

Communications Assistance for Law  
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CC Docket No. 97-213

FEDERAL COMMUNICATIONS COMMISSION  
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**COMMENTS IN SUPPORT OF CTIA PETITION  
TO SUSPEND CALEA COMPLIANCE DATE**

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## TABLE OF CONTENTS

	<u>PAGE</u>
I. A SUSPENSION IS WARRANTED IN LIGHT OF THE UNCERTAINTY CREATED BY THE RECENT COURT DECISION VACATING AND REMANDING PART OF THE COMMISSION'S CALEA ORDER. ....	2
II. IN THE ABSENCE OF A SUSPENSION, CARRIERS WILL FACE THE UNDESIRABLE CHOICE OF VIOLATING ESTABLISHED ELECTRONIC SURVEILLANCE LAW OR VIOLATING CUSTOMERS' PRIVACY RIGHTS.....	4
A. "Punch List" Items.....	4
B. Packet-Mode Communications .....	6
III. GRANT OF A SUSPENSION WILL SERVE THE PUBLIC INTEREST. ....	9
IV. CONCLUSION .....	10

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**COMMENTS IN SUPPORT OF CTIA PETITION  
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BellSouth Corporation, BellSouth Telecommunications, Inc., BellSouth Cellular Corp., and BellSouth Wireless Data, L.P. (collectively "BellSouth")<sup>1</sup> respectfully submit these comments in support of the Cellular Telecommunications Industry Association's ("CTIA") petition<sup>2</sup> to suspend the September 30, 2001 compliance date for implementation of certain assistance capabilities under the Communications Assistance for Law Enforcement Act ("CALEA").<sup>3</sup> BellSouth believes that the most effective and efficient course of action is for the Commission to suspend the compliance date for all six

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<sup>1</sup> BellSouth Corporation is a publicly-traded Georgia corporation that holds the stock of BellSouth Enterprises, Inc. ("BSE") and BellSouth Telecommunications, Inc., a Bell operating company providing wireline telephone exchange and exchange access service in parts of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee ("BST"). BSE holds the stock of BellSouth Cellular Corporation ("BSCC"), a Georgia corporation that provides commercial mobile radio service in markets throughout the United States, and holds personal communications service ("PCS") licenses in North Carolina, South Carolina, Georgia and Tennessee. BSC holds a controlling interest in BellSouth Wireless Data, L.P. ("BSWD"), a Delaware limited partnership that operates a nationwide, packet-switched wireless data communications network using frequencies licensed by the FCC in the Specialized Mobile Radio ("SMR") Service bandwidth.

<sup>2</sup> Petition to Suspend Compliance Date, filed by the Cellular Telecommunications Industry Association ("CTIA"), CC Docket No. 97-213 (filed Aug. 23, 2000) ("CTIA Petition").

<sup>3</sup> See *Comment Invited on CTIA Petition to Suspend CALEA Compliance Date*, CC Docket No. 97-213, *Public Notice*, DA 00-2022 (rel. Sept. 1, 2000).

“punch list” items as well as the packet-mode data capability and establish an appropriate deadline after the outstanding issues are resolved in the remand proceeding.

**I. A SUSPENSION IS WARRANTED IN LIGHT OF THE UNCERTAINTY CREATED BY THE RECENT COURT DECISION VACATING AND REMANDING PART OF THE COMMISSION’S CALEA ORDER.**

On August 15, 2000, the United States Court of Appeals for the District of Columbia (“D.C. Circuit”) vacated and remanded for further proceedings the Commission’s *Third Report and Order*,<sup>4</sup> which required carriers to: (1) implement six “punch list” items and (2) provide law enforcement with location information and access to packet mode communications by September 30, 2001.<sup>5</sup> The D.C. Circuit vacated the provisions regarding four of the six “punch list” capabilities<sup>6</sup> and upheld the requirements that carriers provide law enforcement agencies with location information and access to packet-mode communications.

As the CTIA petition demonstrates, the court’s decision “has created enormous uncertainty in the industry about how to proceed.”<sup>7</sup> There are a number of issues that must be resolved before the industry can move forward. One of the most important issues is what the final list of “punch list” capabilities will be. In order to meet the

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<sup>4</sup> *Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, *Third Report and Order*, 14 FCC Rcd 16794 (1999) (“*CALEA Third Report and Order*”).

<sup>5</sup> *United States Telecom Association, et al. v. Federal Communications Commission, et al.*, No. 99-1442, slip op. (D.C. Cir. August 15, 2000).

<sup>6</sup> The four “punch list” items that were remanded are: (1) post cut-through digits dialed; (2) party hold/join/drop; (3) subject-initiated dialing and signaling; and (4) in-band/out-of-band signaling. Two “punch list” items (timing information and content of subject-initiated conference calls) were not challenged in the appeal and therefore were not before the court.

<sup>7</sup> CTIA Petition at 4.

September 30, 2001 deadline, carriers must make budget and deployment decisions today, not several months from now.

It is unreasonable to hold carriers to a compliance date that was established at the time that the Commission initially defined the CALEA requirements. Since that time, the D.C. Circuit has nullified a number of those obligations, thereby leaving carriers in a state of uncertainty as to their compliance obligations. At this time, it is unknown which, if any, of the remanded “punch list” items will be properly reconsidered and determined to be lawfully required by CALEA. Moreover, it is unknown when the list of required capabilities will be finalized. In light of this uncertainty, it is inefficient and perhaps wasteful for the Commission to require carriers to continue implementing switch software and network upgrades that could change in the near future. Accordingly, the Commission should suspend the compliance date for all six “punch list” items as well as the packet-mode data capability pending final resolution of the remand proceeding.

In order to determine a more appropriate compliance date, the Commission is encouraged to solicit input from the Telecommunications Industry Association (“TIA”). TIA has been actively involved in these proceedings and in the development of both the J-STD-025 and J-STD-025A interim standards. In addition, TIA is close to completing and submitting to the Commission its study of CALEA solutions for packet-mode communications. The Commission should work with TIA to determine how long it will take vendors to modify and carriers to implement CALEA-compliant equipment and software once the final “punch list” items and packet-mode capabilities have been determined.

**II. IN THE ABSENCE OF A SUSPENSION, CARRIERS WILL FACE THE UNDESIRABLE CHOICE OF VIOLATING ESTABLISHED ELECTRONIC SURVEILLANCE LAW OR VIOLATING CUSTOMERS' PRIVACY RIGHTS.**

**A. "Punch List" Items**

If the Commission denies the suspension request, carriers will be placed in the untenable position of either not complying with a court order obtained by law enforcement or providing law enforcement with information that is inconsistent with the recent D.C. Circuit ruling and exceeds the requirements of established law governing electronic surveillance. Providing information to law enforcement that exceeds the scope of CALEA could also violate privacy rights. This dilemma arises because it is unclear whether the CALEA solutions currently being developed by manufacturers enable carriers to disable or switch individual "punch list" features on and off.

The Department of Justice/Federal Bureau of Investigation ("DOJ/FBI"), as part of a "nationwide buyout" of CALEA technical solutions, commissioned several manufacturers to develop switch software packages that carriers could install to meet the CALEA assistance capability requirements. Prior to this buyout, a number of carriers, including BellSouth, commissioned Telcordia to develop a set of generic requirements for a switch-based CALEA-compliant surveillance feature. The resulting document, GR-2973-CORE, specified that software and hardware developed to implement CALEA include the capability to turn specific "punch list" features on and off on a per-surveillance basis. However, this capability was not built into the software. Therefore, today, the industry is faced with a difficult dilemma.

Carriers that install the vendor generic software designed to provide all six "punch list" items will not be able to limit the information provided by such capabilities to law

enforcement. In other words, although the D.C. Circuit vacated and remanded four of the six “punch list” items, if a carrier receives a lawfully authorized electronic surveillance court order, it will not be able to limit appropriately the scope of information provided to law enforcement to the two unchallenged “punch list” items not subject to the court’s remand. Consequently, it is critical that the Commission suspend the compliance date for all six “punch list” items.

The inability to disable certain “punch list” items thereby limiting the information provided to law enforcement raises serious concerns regarding compliance with existing electronic surveillance law and the protection of privacy rights. The Pen Register and Trap and Trace statutes (18 U.S.C. §§ 3121-3127) give law enforcement the authority and impose upon carriers the obligation to provide information regarding the numbers dialed pursuant to a pen register/trap and trace court order. Use of the current technical solutions commissioned by the DOJ/FBI will provide law enforcement with access to customer information that substantially exceeds the requirements of the Pen Register and Trap and Trace statutes.

If a carrier receives a pen register court order, the current CALEA switch software contemplated and being developed will provide law enforcement with all digits dialed, including digits used to route the call through a carrier’s network and digits that constitute call content. This software will also include other signalling information found by the courts to be unlawful. Congress, however, has limited the information that law enforcement may legally obtain through electronic surveillance activities. For example, Congress has defined a pen register as “a device which records or decodes electronic or other impulses which identify the numbers dialed or otherwise transmitted

on the telephone line to which such device is attached . . . .”<sup>8</sup> Thus, the statute as written expressly limits law enforcement to obtaining only dialed number information pursuant to a pen register court order.

The D.C. Circuit acknowledged this restriction when it rejected the Commission’s requirement that carriers provide all dialed digits pursuant to a pen register.<sup>9</sup> The Court found that the Commission, in adopting this requirement, had disregarded CALEA’s privacy provisions. CALEA requires that the Commission’s rules “protect the privacy and security of communications not authorized to be intercepted.”<sup>10</sup> As demonstrated above, carriers that receive a pen register order are technically incapable of excluding the dialed number information from other information sought by law enforcement in the dialed-digit “punch list” item. As such, carriers are at risk of infringing upon privacy rights, not to mention being unable to comply with a court order. Suspending the compliance date for all six “punch list” items will enable the Commission time to resolve these potential conflicts.

#### **B. Packet-Mode Communications**

A suspension of the compliance date for packet technologies is warranted for similar reasons discussed above. All parties are aware that carriers are technically unable at this time to separate call-identifying information from call content in packet-mode communications. Despite being aware of the technical limitations and the resulting privacy consequences, the Commission nevertheless explicitly authorized carriers to

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<sup>8</sup> 18 U.S.C. § 3127(3).

<sup>9</sup> *USTA v. FCC*, slip op. at 19.

<sup>10</sup> 47 U.S.C. § 1006(b)(2).



deliver “packet-mode communications, including call-identifying information and call content, . . . to law enforcement under the interim standard”<sup>11</sup> by the September compliance date. The D.C. Circuit, however, flatly rejected this grant of authority. The court made it clear that carriers are prohibited from providing call content from packet-mode communications pursuant to a pen register order.<sup>12</sup> The court held as follows:

. . . Although the Commission appears to have interpreted the J-Standard as expanding the authority of law enforcement agencies to obtain the contents of communications, . . . the Commission was simply mistaken. . . . CALEA authorizes neither the Commission nor the telecommunications industry to modify either the evidentiary standards or procedural safeguards for securing legal authorization to obtain packets from which call content has not been stripped, nor may the Commission require carriers to provide the government with information that is “not authorized to be intercepted.”<sup>13</sup>

By default, therefore, since separating call content from call-identifying information is technically infeasible using existing packet technology, carriers cannot lawfully provide law enforcement with call-identifying information. Thus, although the court upheld the requirement that carriers provide access to packet-mode data, it negated the use of the interim J-Standard for packet technologies because it fails to honor privacy rights.

Consequently, the industry is back at the starting line. Standards-setting bodies, carriers, and manufacturers have been working together to implement CALEA for over a year with the understanding that the Commission would not consider the delivery of call content to law enforcement a violation of privacy rights in the absence of a permanent

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<sup>11</sup> *CALEA Third Report and Order*, 14 FCC Rcd at 16819, ¶ 55.

<sup>12</sup> *USTA v. FCC*, slip op. at 24-25.

<sup>13</sup> *Id.*

solution for packet technologies. However, the rules have since been changed by the D.C. Circuit.

It is not enough that the TIA is scheduled to deliver a report to the Commission by September 30, 2000 that will identify possible CALEA solutions for packet-mode technology. This report is only the first step. Subsequent steps include: (1) the adoption of an appropriate technical standard that not only meets the CALEA requirements but also adequately protects privacy interests; (2) the design and development of software and hardware based on the new standard; and (3) the installation, testing, and deployment of such software and hardware by carriers. A suspension is warranted because these steps were not considered when the Commission initially established the September 30, 2001 compliance date. At that time, the Commission determined that providing call content and call-identifying information to law enforcement was a permissible and achievable solution by September 30, 2001.

Now, however, that September 2001 date is in jeopardy. Not only have new technical requirements for packet technologies yet to be developed, but the D.C. Circuit has ruled that the existing J-Standard cannot be used for packet-mode communications because of the privacy consequences. At this time, therefore, the industry is operating without any standard at all for delivering call-identifying information from packet-node communications. Moreover, it is uncertain when an appropriate standard will be fully developed and when, or even if, the pen register statute will be amended to address the privacy concerns. Accordingly, BellSouth urges the Commission to suspend the compliance date for packet technologies and establish a more appropriate date after it has had an opportunity to resolve the various outstanding issues discussed above.

### **III. GRANT OF A SUSPENSION WILL SERVE THE PUBLIC INTEREST.**

Grant of a suspension will serve the public interest because it strikes the appropriate balance among competing factors, including the recent court decision, the needs of law enforcement, the current technical limitations, privacy rights, and carriers' implementation issues. BellSouth, like every other responsible carrier, will continue to abide by the law and cooperate with law enforcement officials in assisting with properly authorized electronic surveillances. Thus, there is no need to rush in the face of such tremendous uncertainty.

Moreover, it is more cost effective to grant a suspension. Requiring manufacturers and carriers to continue developing and implementing solutions, not only deemed unlawful but also subject to future replacement, is inefficient, duplicative, and costly. In addition, interoperability problems may arise if carriers are forced to install, implement, and test multiple software packages. These additional steps could delay the date for full CALEA compliance and unnecessarily increase carrier costs.

Cost-effective compliance is an overarching principle of CALEA and cannot be ignored. The Commission has a statutory obligation to ensure that the rules implementing CALEA "meet the assistance capability requirements . . . by cost-effective methods"<sup>14</sup> and "minimize the cost of such compliance on residential ratepayers."<sup>15</sup> A suspension will avoid imposing additional costs on the industry and in the end, on the DOJ/FBI, which would be responsible for such costs. Therefore, BellSouth urges the

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<sup>14</sup> 47 U.S.C. § 1006(b)(1).

<sup>15</sup> 47 U.S.C. § 1006(b)(3).

Commission to grant a suspension of the September 30, 2001 compliance date for both the six "punch list" items and packet-mode communications.

#### IV. CONCLUSION

In light of the uncertainty created by the recent court decision vacating part of the Commission's CALEA order, BellSouth urges the Commission to suspend the September 30, 2001 compliance date for implementation of the six "punch list" capabilities and the packet-mode data capability. The most reasonable, efficient, and cost-effective course of action is for the Commission to establish a compliance date after it has had an opportunity to fully consider and resolve the outstanding issues in the remand proceeding. In the interim, carriers will continue to cooperate with law enforcement to meet their needs within the parameters of the law.

Respectfully submitted,

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September 15, 2000

## **CERTIFICATE OF SERVICE**

I do hereby certify that I have this 15th day of September, 2000, served the following parties to this action with a copy of the foregoing ***COMMENTS IN SUPPORT OF CTIA PETITION TO SUSPEND CALEA COMPLIANCE DATE***, reference CC Docket No. 97-213, by hand delivery or by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties on the attached service list.

A handwritten signature in cursive script, reading "Rachelle L. Thomas", is written over a horizontal line.

Rachelle L. Thomas

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